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6 U.S. Bank National Association, Successor in
Interest to the Federal Deposit Insurance
7 Corporation as Receiver for PFF Bank &
Trust and FCI Lender Services, Inc.
8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

12 CURTIS CORUM, an individual,
13 Plaintiff,
14

15 v.
16

17 PFF BANCORP, INC., a/k/a/ PFF
BANK & TRUST, a Delaware
corporation doing business in
California; U.S. BANK, N.A., a
Minnesota corporation doing business
18 in California; FCI LENDER
SERVICES, INC., a California;
TRAVIATA LENDING, a Business
19 Entity, form unknown; SOUTHLAND
TITLE, a Business Entity, form
20 unknown; MORTGAGE
ELECTRONIC REGISTRATION
21 SYSTEMS, INC., a Business Entity,
form unknown; and DOES 1-100,
22 inclusive,
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Defendants.
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Case No. ED CV 09-2272-JVS (DTBx)

**DEFENDANTS U.S. BANK
NATIONAL ASSOCIATION,
SUCCESSOR IN INTEREST TO
THE FEDERAL DEPOSIT
INSURANCE CORPORATION AS
RECEIVER FOR PFF BANK &
TRUST'S AND FCI LENDER
SERVICES, INC.'S OPPOSITION
TO PLAINTIFF'S EX PARTE
APPLICATION FOR
PRELIMINARY INJUNCTION;
DECLARATION OF RICHARD B.
SWINNEY IN SUPPORT THEREOF**

Crtrm: 10C
Judge: Hon. James V. Selna

[First Amended Complaint Filed:
November 4, 2009]

1 I.

2 **INTRODUCTION**

3 Plaintiff Curtis Corum ("Plaintiff") asserts in his ex parte application that a
4 temporary restraining order is appropriate to block foreclosure and eviction
5 proceedings because 1) no assignments of the deeds of trust at issue have been
6 recorded and 2) the party initiating foreclosure proceedings does not have
7 possession of the original promissory notes. U.S. Bank National Association
8 Successor In Interest To The Federal Deposit Insurance Corporation As Receiver
9 For PFF Bank and Trust ("U.S. Bank") and FCI Lender Services, Inc. (with U.S.
10 Bank, "Defendants") oppose Plaintiff's request on the grounds that California law
11 does not require the recordation of an assignment of a deed of trust where a deed of
12 trust gives the power of sale to a trustee as is the case here and possession of the
13 original promissory note is not required to initiate non-judicial foreclosure
14 proceedings in California.

15 The possibility of irreparable harm alone cannot justify a temporary
16 restraining order or a preliminary injunction. Instead, a plaintiff must show at least
17 some possibility of success on the merits of his claims to entitle him to injunctive
18 relief. *Aguirre v. Chula Vista Sanitary Service & Sani-Tainer, Inc.*, 542 F.2d 779,
19 781 (9th Cir. 1976) (requiring a clear showing of at least some possibility of success
20 on the merits before injunctive relief will issue). If a movant will not prevail on the
21 merits of his claims, he may not obtain a preliminary injunction – no matter the
22 harm that may result. *See Global Horizons, Inc. v. U.S. Dept. of Labor*, 510 F.3d
23 1054, 1058 9th Cir. 2007); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d
24 411, 417 (4th Cir. 1999) ("[W]here it is legally impossible for a plaintiff to succeed
25 on the merits of its underlying claim, the district court may not grant the requested
26 injunction, no matter how severe or irreparable an injury the plaintiff may otherwise
27 suffer.") As discussed more fully below, Plaintiff's ex parte application does not
28

1 demonstrate even the merest possibility of success on the merits of his claims and
2 his request for a temporary restraining order must be denied as a result.

3 **II.**

4 **ARGUMENT**

5 A. California Law Does Not Require An Assignment Of A Deed Of Trust Prior
6 To Initiating Foreclosure Proceedings Where The Power Of Sale Is Given To
7 A Trustee.

8 Plaintiff first argues that U.S. Bank has no enforceable right to conduct the
9 foreclosure sales because no assignments of the deeds of trust have been recorded.
10 This appears to be a claim under California Civil Code 2932.5, which governs
11 assignments of mortgages. California law is clear, however, that a recorded
12 assignment of a deed of trust is not required for a trustee to exercise the power of
13 sale.

14 Plaintiff is wrong in claiming that California law requires the recordation of
15 an assignment of the beneficial interest in a loan prior to initiating a non-judicial
16 foreclosure. By its express language, section 2932.5 requires recordation only when
17 the power of sale is “given to a mortgagee or other encumbrancer” in the security
18 instrument. “In a non-judicial foreclosure, also known as a ‘Trustee’s Sale’ the
19 trustee exercises the power of sale given by the deed of trust.” *Nguyen v. Calhoun*,
20 105 Cal. App. 4th 428, 440 (2003).

21 “The transferee of a negotiable promissory note, payment of which is secured
22 by a deed of trust whereby the title to the property and power of sale in case of
23 default is vested in a third party as trustee, is not an encumbrancer to whom power
24 of sale is given, within the meaning of section 858 of the Civil Code.” *Stockwell v.*
25 *Barnum*, 7 Cal. App. 413, 417 (1908).¹ Here, the security instruments are deeds of

26 ¹ California Law Revision Commission’s note to current Civil Code Section 2932.5 states:
27 “Section 2932.5 continues former section 858 without substantive change.” 18 Cal. L.
28 Review Comm. Reports 501 (1986).

1 trust which give the power of sale to the trustee, not the beneficiary. (Declaration of
2 Richard B. Swinney “Swinney Decl.,” Exs. A, B.) Civil Code Section 2932.5 only
3 applies when the power of sale is given to another encumbrancer. It does not apply
4 where, as here, the power of sale is given to the trustee and not the beneficiary. (*Id.*)

5 Simply stated, Plaintiff’s belief that an assignment of the deeds of trust must
6 have been recorded to initiate the foreclosure process is mistaken and reflects
7 Plaintiff’s fundamental misunderstanding of California law.

8 In any event, Plaintiff admits in his ex parte application that PFF was the
9 original lender on both of the loans at issue here. U.S. Bank is the successor in
10 interest to PFF by virtue of its acquisition of PFF’s assets in a transaction facilitated
11 by the Federal Deposit Insurance Corporation in November 2008. (Swinney Decl.
12 ¶ 3.) Because U.S. Bank is the direct successor in interest to PFF, there is no need
13 for an assignment of the deeds of trust.

14 B. Production Of The Original Promissory Note Is Not A Prerequisite To Non-
15 Judicial Foreclosure Proceedings In California.

16 The California legislature has enacted a comprehensive set of statutes
17 governing non-judicial foreclosures. *Moeller v. Lien*, 25 Cal. App. 4th 822, 834
18 (1994). Nowhere in that statutory scheme is a requirement that the lender or trustee
19 possess or produce the original promissory note to initiate and complete foreclosure
20 proceedings. Imposing such a requirement when the legislature saw fit to leave it
21 out would be inappropriate.

22 Courts throughout California have refused to do so despite the flood of
23 borrower lawsuits challenging foreclosure sales that have resulted from California's
24 popping real estate bubble:

25 **Finally, California law does not require that the**
26 **original note be in the possession of the party initiating**
27 **non-judicial foreclosure.** *See* Cal. Civ.Code § 2924.
28 Plaintiff’s allegation about the possession of the original
note is without merit and must be dismissed.

1 *San Diego Home Solutions, Inc. v. Recontrust Company*, 2008 WL 5209972 *2
2 (S.D. Cal. 2008).

3 Cal. Civ.Code § 2924 outlines the requirements for non-
4 judicial foreclosures in California, and does not include
5 providing the original note prior to the sale. **Additionally,**
6 **under California law, an “allegation that the trustee**
7 **did not have the original note or had not received it is**
8 **insufficient to render the foreclosure proceeding**
9 **invalid.**” *Neal v. Juarez*, 2007 WL 2140640 (S.D. Cal. July
23, 2007) (*citing* *R.G. Hamilton Corp. v. Corum*, 218 Cal.
92, 97, 21 P.2d 413 (1933) and *California Trust Co. v.*
10 *Smead Inv. Co.*, 6 Cal.App.2d 432, 435, 44 P.2d 624
11 (1935)). Plaintiffs' claim under this statute is therefore
12 dismissed without prejudice.

13 *Tina v. Countrywide Home Loans, Inc.*, 2008 WL 4790906 *8 (S.D. Cal. 2008)
14 (emphasis supplied); *see also Rogers v. Cal State Mortg. Co. Inc.*, 2010 WL 144861
15 (E.D. Cal. January 11, 2010). Plaintiff's claim that the foreclosure sales must be set
16 aside or restrained and that eviction proceedings must be blocked for alleged lack of
17 possession of the original promissory note is utterly without merit and, as a result,
18 cannot support injunctive relief.

19 **III.**

20 **CONCLUSION**

21 For the foregoing reasons, Defendants respectfully request that the Court deny
22 Plaintiff's request for a temporary restraining order.

23 Dated: January 20, 2010

24 OFFICE OF THE GENERAL COUNSEL

25 By: /s/Eric M. Alderete

26 ERIC M. ALDERETE

27 Attorney of Record for Defendants,
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